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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH C. LEMIRE, JON T. STEPHENS,
LIONEL W. ACHUCK and INTERCONEX, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. The government's opposition attempts to disguise the radical character of the court of appeals' decision on the basis of a single, erroneous proposition—that the court of appeals "was able to determine that the jury convicted petitioners under a proper theory, not under the theory the court rejected." Opposition at 8. In fact, the court of appeals did not do so; it did not purport to do so, nor could it have done so. Such a task is impossible in light of the jury's general verdict and the closely contested issue of economic harm.

The opinion below explains precisely what the court of appeals did. It placed the burden on the defendants to demonstrate that the jury acted on the improper theory.

It framed the dispositive question as whether the record "*support[ed] an inference* that the jury acted pursuant to" the erroneous instruction. App. 9a (emphasis supplied). Finding that the record did not affirmatively demonstrate a "significant likelihood" that the jury acted on the invalid theory, the court affirmed. App. 27a.

The government feebly attempts to justify this result under *Street* v. *New York*, 394 U.S. 576 (1969). But *Street* only makes the court of appeals' error clearer. It permits affirmance of a criminal conviction only where the record "negates the possibility" that the conviction was based on the invalid ground. *Id.* at 588 (emphasis supplied).[3]

The court of appeals' approach stands the *Street* standard on its head, shifting the burden to the defendant to prove that the jury acted on the invalid theory. Under *Street*, the test is whether the record proves conclusively that the trier of fact did *not* act on the invalid theory, not whether the record demonstrates that it did. As this Court recently explained in *Zant* v. *Stephens*, 103 S. Ct. 2733 (1983), *Street* holds that where one of the theories submitted to the jury is invalid, a conviction may be upheld only where "there is *no uncertainty* about the multiple grounds on which a general verdict rests." 103 S. Ct. at 2746 (emphasis supplied).

The kind of speculative inquiry conducted by the court of appeals is clearly contrary to the rule of *Stromberg* v. *California*, 283 U.S. 359 (1931), and its progeny.

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[3] Similarly, the government's contention that the conviction on Count 2, transportation of the proceeds of fraud in foreign commerce in violation of 18 U.S.C. § 2314, somehow cures the erroneous wire fraud instruction and justifies the court of appeals' result cannot withstand scrutiny. The jury would have been required to convict on Count 2 if it found a scheme to defraud under either of the government's trial theories. Even if the jury concluded that Raytheon was deprived only of the loyal services of its employees—the wire fraud theory held invalid by the court of appeals—any money received from Raytheon for services rendered would have been "taken by fraud."

Stromberg mandates that where "it is improper to submit a case on one of two alternative theories, a new trial must be granted . . . ." *Government of the Virgin Islands* v. *Richards*, 618 F.2d 242, 244 (3d Cir. 1980).

The government's present argument that the jury could not have convicted on the erroneous theory is directly contrary to its position in the trial court. There, over the objections of the defendants, the government successfully persuaded the trial court to adopt the erroneous fiduciary fraud theory precisely so that the jury could convict without finding economic harm to Raytheon. C.A. 3108.

The facts of this case were hotly contested at trial, particularly as to whether Raytheon suffered any economic harm. The evidence showed that the IMS-Interconex proposal was the *lowest* bid received by Raytheon—more than $1 million lower than that of the nearest competitor, with most of the cost difference found in the transportation component of the bid. In order to circumvent that evidence, the prosecutors argued in the trial court for a two-pronged instruction that required the jury to convict if it found a scheme to deprive Raytheon of *either* money *or* the loyal services of its employees. The prosecutors stated that "the jury should be absolutely clear . . . that [it] can convict on *either* theory and should be so instructed. It's absolutely crucial." C.A. 3108 (emphasis supplied). The trial court charged the jury as the prosecutors requested. The erroneous instruction was the *only* instruction on the elements of wire fraud in the initial charge and, more importantly, the jury was reinstructed on the erroneous theory at the end of its first day of deliberations.[3]

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[3] The government's claim, Opposition at 10 n.5, that the court of appeals fully considered the effect of the erroneous reinstruction is made from whole cloth. Nowhere in its fifty-page opinion did the court of appeals refer to the reinstruction. The absence of any mention of this glaring error best illustrates the fallacy of the court's decision.

Now the government executes a 180° turn, arguing that its "crucial" instruction did not do precisely what both the prosecutors and the trial court intended it to do—permit a conviction without a finding of economic harm. Opposition at 9. And just as the government must now disavow its trial theory, so must it now contend that the court below "was able to determine" the theory on which the jury based its verdict. But, however often the government repeats this proposition, it is simply not true; the general verdict here is as opaque to appellate scrutiny as was the general verdict in *Stromberg*.

The court of appeals' decision makes a mockery of the rule of *Stromberg*, sapping the vitality of a principle based on fundamental guarantees of the Due Process Clause and the Sixth Amendment. It sets a new precedent for appellate speculation into the jury's decision and permits convictions to stand on the flimsy foundation of what an appellate court *thinks* the jury decided. This practical nullification of *Stromberg* merits review by this Court.

2. Contrary to the government's characterization, the restitution question in this case is far from "fact-bound." The court of appeals' affirmance of the restitution order condones the trial court's exercise of broad new power to impose economic judgments without the constitutional protections of the Seventh Amendment right to a jury trial, or even the minimal due process safeguards of a hearing focused on the question of economic injury.

The existence of the vigorous factual dispute on the economic injury point in this case merely serves to highlight the breadth of the stroke taken by the trial court in imposing $1.75 million in restitution based neither on the jury verdict nor on the outcome of a hearing devoted to the question. The potential inherent in the Victim and Witness Protection Act of 1982, 18 U.S.C.A. §§ 3579-80 (West Supp. 1982), for imposition of similar economic sentences without procedural safeguards was the very

reason another district court recently struck down that law as unconstitutional. *United States* v. *Weldon*, 568 F. Supp. 516 (N.D. Ala. 1983), *appeal docketed*, No. 83-7444 (11th Cir. August 18, 1983). The analysis of *Weldon* has now been cited with approval in another recent case. *St. Paul Fire and Marine Insurance Company* v. *Cox*, No. 78-G-1236-M (N.D. Ala. 1984), slip op. at n.2.

The question whether the Seventh Amendment and Due Process rights of criminal defendants may be so lightly tossed aside merits review by this Court.

CONCLUSION

For the reasons set forth above and in their petition, petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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